Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1998

UNITED STATES OF AMERICA
EX.REL.DILIP K. PAUL,

Petitioners,

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC, BATTELLE MEMORIAL INSTITUTE, ANSON PHIPPS, PAUL BOULON and ROBERT M. WOOD,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner filed the instant action in Texas State Court. All of the defendants did not join the removal petition. The Courts below refused to remand the case to the State Court. Are these rulings in error?

2. All defendants, except Battelle invoked the State Court's jurisdiction by defending the case there. Did those defendants waived their rights of removal?

3. The removal statute, 28 U. S. C. § 1446(d) mandates "prompt" notification of removal to petitioner. The removing defendants **took 8 (eight) days** to notify petitioner. Did the removing defendants violate the statutory mandate of "prompt" notification?

4. Plaintiff is required to file his motion to remand within 30+3 = 33 days of removal petition. Did the delay in notifying petitioner equitably tolled his 30 days time to file his motion to remand? The Courts below ruled against petitioner because he was 1 day late in filing his motion. Are these rulings comply with the Due Process of the law?

5. Defendant Robert Wood filed a motion for Jury trial on 4/7/97, 11 days after removal. Petitioner filed his motion on 4/30/97, 23 days after Wood's filing? The Court's below ruled that Wood's filing satisfy the requirements of the removal statute and was timely. However, petitioner's filing, after 23 days of Wood's filing was untimely, and Petitioner has waived his rights to remand on non-jurisdictional defects on removal. Are these defects non-jurisdictional? Further, are these rulings satisfy the due process of the laws?

6. Petitioner's ex-attorney, Robert Wood, sold his case to PB-KBB, and in collusion with them entered a judgment against petitioner in the Harris County District Court. Petitioner, upon discovery of collusion, brought this action in

that Court. The U. S. District Court dismissed petitioner's case saying that a District Judge can dismiss an action and the Circuit Court dismissed it saying that petitioner's claims are res judicata, even though Robert Wood was never a party in any prior litigations, was neither a privy to any party to any litigations against petitioner. Are these rulings in error?

7. Petitioner, upon discovery of collusion, conspiracy, and frauds upon the Harris County Court, brought this in that court against PB-KBB, PBQ&D, Anson Phelps, Paul Bouillon and their privy Battelle. Defendants admitted to the Fifth Circuit that they obtained the original judgment by fraud on the Court. The Courts below arbitrarily, unlawfully and against overwhelming evidence on record, dismissed petitioner's case declaring res judicata. Are these in error?

8. Petitioner also determined that PB-KBB, PBQ&D, Arson Phipps and Paul Boulon committed perjuries in their two affidavits, concealments, cover-ups, obstruction of justice, violation of RICO, during the litigation of H-92-2429, in the US. District Court, in the Fifth Circuit Court and in this Court, when they introduced FRCP § 12(b)(6) motions, refused to answer petitioner's discovery questions and introduced false affidavits under FRCP § 56, under bad faith to have petitioner's case dismissed, claiming res judicata. Plaintiff was unaware of the frauds in the Harris County Court, did not discover the evidence and could not produce the evidences to support his motions and his action was dismissed, citing res judicata. The Courts below now **presume** that petitioner could have introduced the undiscovered evidences and brought the instant action at that time, about which he had no knowledge of, and dismiss the instant action as res judicata, by rewarding the wrongdoers and punishng the victim, innocent petitioner. Are these rulings comply with the due process of the laws?

9. Petitioner then brought a FRCP § 60(b) motion in the US District Court to address the frauds perpetrated while

litigating H-92-2429, introduced evidences discovered up to that time showing that PB-KBB have taken inconsistent positions in the Harris County Court and in the earlier Federal MINE SAFETY & HEALTH REVIEW COMMISION's proceedings. The US District Court **did not have jurisdiction under FRCP 60(b)** to consider the frauds and perjuries perpetrated in the Harris County Court in another lawsuit, 87-30221, **5/6 years** earlier and it denied petitioner's motion. Now the Courts below **reversed their earlier stands** and ruled that whatever evidence discovered during the FRCP 60(b) motion and whatever was evidence **not discovered, and whatever evidence discovered afterwards,** all became res judicata, even though the defendants now admit in their own briefs, that they have obtained the Harris County Judgment by frauds. Are the rulings of the Courts below in error?

10. Did petitioner's claims under RICO, 42 USC § 1961 et seq. accrued **prior** to his discovery of his injuries. The rulings of the Court below presume this and ruled that petitioner's claims under RICO are res judicata. The Courts below disregarded the discovery rules. Are these in error?

11. Under Texas case laws, petitioner's claims against Robert Wood did not accrue prior to his discovery of Wood's breach of fiduciary duty and tortious conducts in the Harris County Court. The Court below ruled that his claims accrued and became res judicata, **prior** to the discovery of his injuries. Are these rulings erroneous?

12. RICO claims are subject to rule of separate accrument. Every time plaintiff discovers a RICO injury, a cause of action accrues for that injury. The Courts below denied petitioner benefits of this rule? Is this an error?

13. Petitioner brought his action in the Harris county Court to set aside the judgment obtained by collusive frauds, under the **False Claims Act,** 31 USC § 3730 and under RICO, 18

USC § 1961 et seq. Petitioner has single wrong, arising from interlocked and successive series of transactions, and the recovery of one claim could be pleaded in partial satisfaction of subsequent action. Defendants, except Robert Wood, filed removal petition on March 27, 1997, citing separate and independent claims under the False Claims Act and under RICO. Are the claims separate and independent to permit removal under 28 USC 1441 (b) and(c). The Courts below permitted removal. Are these rulings erroneous?

14. Did the Courts below acted within bounds of the due process clause of the Fifth and Fourteenth Amendments of the U. S. Constitution in unlawfully, arbitrarily, capriciously and against the overwhelming evidence on record, dismissing petitioner's claims and assessing $9,356.25 as attorneys' fees and costs for Battelle and PB-KBB et al.?

LIST OF PARTIES

The Following are the parties to this proceeding:

Dilip K. Paul
Plaintiff-Petitioner

United States of America
Plaintiff-Petitioner
Represented by relator, Dilip K. Paul

PB-KBB Inc.,Parsons, Brinkerhoff, Quade & Douglas Inc. (PBQ&D), Paul Boulon, Arson Phipps (AKA. PB-KBB et al
Defendants-Respondents
Arson Phipps, Attorney for PB-KBB et. al

Battelle Memorial Institute (BMI)
Defendent-Respondent
Frederick Robinson, Counsel of Record
Attorney for Battelle Memorial Institute

Robert M. Wood
Defendant-Respondent
Robert M. Wood, Counsel Of Record for Robert Wood

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DECISIONS BELOW

The Decision of the United States Court of Appeals for the Fifth Circuit (Appendix, A1 & A2) affirmed a judgment (Appendix, A 3 & A4) in favor of the defendants of the United States District Court for the Southern District of Texas, Houston Division.

JURISDICTION

Petitioner seeks review of judgments of the United States Court of Appeals for the Fifth Circuit, entered on July 10 and

September 21, 1998. This Court's jurisdiction is invoked pursuat to 28 U.S.C. § 1254(1). The Petition For Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c)

STATUTES PRESENTED FOR REVIEW

The removal statute, 28 U. S. C. § 1446(d), provides, in relevant part,

(a) Promptly after filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties----

Racketeer influenced and Corrupt Organizations Act, 18 USCS § 1961, provides, in relevant parts

(b) (1) "racketeering activity" means (B) any act which is indictable under any of the following provisions of title 18 United States Code: section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1512 (relating to tempering with a witness, victim, or an informant) section 1503 (relating to obstruction of justice)

(c) (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occured after the effective date of this chapter and the last of which occured within ten years after the commission of a prior act of racketeering activity"

Federal Rules of Civil Procedure, Rule 11, as amended in 1993, provides, in releveant parts:

(d) Representations to Court. By presenting to the court (whether by signing, filing, dubmitting, or advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of person's

knowledge, information, and belief, formed after an inquiry reasonable under the circumstances-----

(3) the allegations and other factual contentions have evidentiary supportor if, specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and ---

(e) Sanctions. If after notice and a reasonable opportunity to respond, the court determinies that subdivision (b) has been violated, the court may subject to the conditions stated below, impose an appropriate sanction upon attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule.... may consist of....an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Federal Rules of Civil Procedure, Rule 56 (g), in relevant part:

(g) Affidavits Made in Bad Faith. Should it it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith ---------the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur including reasonable attorney's fees, ant any offending party or attorney may be adjudged guilty of contempt.

Federal Rules of Civil Procedure, Rule 60. Relief from Judgment or Order, in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons;

(2) newly discovered evidence which by due dilligence could not have been discovered in time for a new trial under Rule 59(b)

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconducts of an adverse party.

The motion shall be made within a reasonable time, and for reasons (1),(2), and (3) not more than one year after after the judgment, order or proceeding was entered or taken.

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, --- or to set aside a judgment for fraud upon the court.

Texas Court Rule 12, in relevant part:

Attorney to show authority: A party in a suit or proceeding pending in a court of this state may by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defendaed without authority, cause the attorney to be cited to appear before the court and show his authority to act.----------

Upon his failure to show such authority, the court shall refuse to permit the attorney to appear before the cause, and shall strike the pleadings if no person who authorized to prosecute or defend appears

STATEMENT OF THE CASE
Procedural History in Texas State Court

After discovering the fact that petitioner's ex-attorney, Robert Wood, sold his case to PB-KBB in a prior State Court case, 87-30221, petitioner brought this action in the Harris County District Court, Texas, on December 6, 1996, for setting aside the original judgment for fraud on the Court. The processes were served duly on Defendant Anson Phipps on 3/3/97, on Robert Wood on 3/10/97, on Battelle Memorial Institute (BMI) on 3/10/97, and Parsons, Brinkerhoff, Quade & Douglas, Inc (PBQ&D) on 3/14/97.

Defendant Robert Wood entered a plea of general denial on March 10, 1997, and initiated the discovery procedures. Defendant Anson Phipps filed a dispositive motion on 3/14/97, setting forth all of his defenses, asked that Court to dismiss petitioner's case and for imposing sanctions. Petitioner did not receive these pleadings timely and on 3/24/97 filed a motion under Rule 21a of Texas Court for more time for responding. Defendants PBQ&D, PB-KBB and Paul Boulon filed a dispositive motion and asked that Court for sanctions through their attorney, Anson Phipps, on 3/26/97.

Removal to U. S. District Court: Defendant BMI, PB-KBB, PBQ&D, Paul Boulon and Anson Phipps then filed a motion for removal **"under 28 U. S. C. § 1441(B)/ §1441 (c) (Federal question)"** on 3/27/97, citing **"because it contains separate and independent claims arising under 31 U. S. C. § 3730 amd 18 U. S. C. § 1961 et. seq."** The removing defendants, in violation of **Prompt notification** mandate of the removal statute, 28 U. S. C. § 1446(d), mailed their bulky motion under certified mail which reached petition on 4/4/97, **eight days after mailing.** The removing defendants failed to State that defendant Robert Wood did not join the removal petition, as required under the removal statute, [28 U. S. C. § 1446]. Petitioner remained oblivious

to the fact that the case was removed to the Federal Court, without Robert Wood's joining the petition, until he discovered it in May, 1997.

The non-removing defendant Robert Wood filed a motion in the Federal Court on 4/7/97 demanding jury trial. Petitioner filed a motion to remand on 4/30/97, citing that his complaint **does not contain "separate and independent claims"** as required under 28 U. S. C. § 1441(c). Petitioner then filed several motions for remanding the case to the State Court stating that the Federal Court did not have the subject matter jurisdiction, the removal petition did not meet a number of mandates of the removal statute, 28 U. S. C. § 1446 et seq., and there are several defects in the removal procedures.

Petitioner also filed his supplemental petition and appendices, as promised in his Texas Court Rule 21a motion, responding to all of the issues raised by defendants in the State and Federal Court. The District Court in its ruling stated petitioner **did not specifically respond to defendants' issues raised and then at the end of the same ruling, denied petitioner's response (see foot note 7, p A49 of appendix 3, and p A63 of the same appendix, when the Court DENIED Petitioner's First Supplemental Petition & Motion for Estoppels, Doc . # 17)**

The District Court denied all of petitioner's motions to remand, stating different reasons than the ones claimed by the removing defendants. The District Court did not even look at the claims made by the petitioner, ignored the responses filed by the petitioner, did not look at what the removing defendants were saying, ignored pleadings submitted by petitioner, ignored the evidence on record, ignored the discovery rules applicable in the instant case. **The district arbitrarily found that petitioner's instant case is indistinguishable than his earlier actions and**

unlawfully dismissed petitioner's case against all the defendants.

Petitioner stated that his instant action is based on newly discovered evidence **of collusive frauds on the Court, which were not discovered previously.** Petitioner followed the procedures outlined in the Restatement of the Law Of Judgment, Second, Chapter 5, Relief fom Judgment; § 70, pp 179-187. However, the Courts below ignored all of the evidences, rule of law and pleadings on record.

Petitioner then filed his appeal in the Fifth Circuit Court of Appeals, pointing out the unlawful removal, lack of subject matter jurisdiction and the case is based on newly discovered evidences. In the Circuit Court, **PB-KBB admitted this time that they obtained the original Harris County judgment by fraud, which they previously denied under oath several times.**

The Fifth Circuit Court ruled that petitioner waived his rights to remand stating that he did not file his motion within 30 days of removal petition, i. e. he did not file his motion by 3/29/97, 33 days after the removal petition was filed. As per the Fifth Circuit, petitioner was 1 day late in submitting his motion to remand and thus he waived his rights to remand.

The Fifth Circuit Court also ignored the newly discovered evidence, ignored the discovery rules and declared petitioner's claims are barred by res judicata. The Fifth Circuit disregarded defendants' misconducts and fraudulent activities during litigations. The Fifth Circuit disregarded the fact that collusive frauds took place between petitioner's ex-attorney and PB-KBB and he was unaware of those frauds on the Court. The Fifth Circuit presumed that petitioner was aware of the collusive frauds on the Court, and dismissed his claims declaring res judicata. The Fifth Circuit also ruled that petitioner cannot sue his ex-attorney Robert Wood for

breach of fiduciary duties, for selling his case to PB-KBB, for mail and wire frauds and for abuse of process in the Harris County District Court. The Court ruled that his claims against Wood is barred by res judicata even though Wood was never a party in any litigation against the petitioner, neither he was in privity with anyone in any prior litigations.

PRIOR LITIGATION HISTORY

Petitioner was fired by PB-KBB on August 16, 1982, and he filed a complaint with the Mine Safety and Health administration (MSHA) of the Department of Labor, in September of that year, alleging unsafe designs of the facilities. PB-KBB, by that time, contacted petitioner back for rehiring. But after learning of the complaint with MSHA, it refused to rehire him. Petitioner also filed with the EEOC because he believes that PB-KBB's Pakistani employee discriminated against him because that employee, Mahmud Mirza, did not know how to design the contracted for facility, and has started to work on the project declaring himself as an expert in mine design. Mahmud Mirza was afraid that petitioner would find out about his ignorance in mine design and could get him fired. Mirza was never trained as an engineer and has never even read an undergraduate book in mine design. He joined PB-KBB "to learn" how to design such a facility because that knowledge would be required in Pakistan's nuclear program.

Petitioner, after being fired, applied to a number of other organizations, including to Battelle, for a job, but PB-KBB defamed and blackballed petitioner. He remained unemployed and underemployed for more than six years, lost all of his savings and lost his family too.

Petitioner, then hired Robert Wood to represent him in pursuing the EEOC complaint. Robert Wood filed complaint

with the Federal Mine Safety and Health Review Commission (FMS&HRC) of the Department of Labor. Robert Wood also filed the title VII complaint in the U.S. District Court, but never served the process. The FMS&HRC complaint was pressed where PB-KBB admitted in open Court that they are not in the mining business, they are an architectural company. They do not care for the Government's project and they lied in their bidding document claiming their expertise in mining engineering. They also admitted firing petitioner for his pointing out of the criminal and fraudulent designing of the Federal facilities. The FMS&HRC then did not give coverage on petitioner's case and it was dismissed for lack of subject matter jurisdiction.

Robert Wood then filed the case no. 87-30221 with the Harris County District Court, Texas, for wrongfully firing petitioner. However, during the pretrial stage, PB-KBB corrupted Wood, and bought out petitioner's case from him. Robert Wood connived with PB-KBB to bring about petitioner's defeat in October, 1989.

Petitioner then filed his pro se qui tam suit H-92-2429 on August 10, 1992, in the U. S. District Court in Houston, under the False Claims Act, 31 U. S. C. § 3730. It was filed claiming Federal jurisdiction. This suit was not filed to make any collateral attack on the Harris County judgement. PB-KBB, perjured to a material fact, filed a Fed. Rule Of Civ. Proc. § 12(b)(6) motion for summary dismissal, claiming res judicata, by showing the Harris County judgment. Petitioner then submitted his written interrogatories to PB-KBB's attorneys, which they refused to response. Petitioner filed to the Court to compel PB-KBB to respond. However, PB-KBB, once again covered-up of their collusive frauds on the Harris County Court, and have the Court issued an order denying petitioner's discovery requests. Further, PB-KBB's two attorneys, Anson Phipps and Paul Boulon, filed a motion under Fed. Rule Of Civ.

Proc. § 56(b), supported by two perjured affidavits, filed under bad faith, concealing material facts about what happened in the Harris County Court, claimed res judicata, and asked the Court to dismiss petitioner's case. Petitioner could not defend against the Rule 56(b) motion, as he did not discover the collusive frauds on the Harris County Court. Petitioner's case was dismissed as a result.

Petitioner, then noticed that PB-KBB perjured in their depositions in the State Court case and their testimonies in the State Court and in prior FMS&HRC proceeding, are inconsistent with each other. Petitioner then filed a Fed Rul. of Civ Proc. § 60(b) motion on 7/19/95 in the Federal Court, showing that PB-KBB lied in the Federal Court about their State Court judgment, and to set aside the summary judgment entered under H-92-2429. PB-KBB, once again, perjured itself about the collusive frauds on the Harris County Court, submitted a Fed Rul. of Civ. Proc. § 12(b)(6) motion. Again, petitioner did not discover the collusive fraud on the Harris County Court at that time and could not defend against the motion. The Court denied petitioner's Rule 60(b) motion as it did not have the subject matter jurisdiction to set aside the H-92-2429 judgment, in 1995, based on PB-KBB's perjurious depositions in the State Court proceeding under 87-30221 in September, 1989.

DISCOVERY OF COLLUSIVE FRAUDS:

Petitioner, on 8/9 October, 1996, discovered that his ex-attorney, Robert Wood, in collusion with PB-KBB, submitted "two collusive motions in limine" in the Harris County Court in October, 1989, eliminating all of petitioner's claims, issues and evidence against PB-KBB from that Court's record. Petitioner at that point determined that these

were done as a part of the conspiracy where Robert Wood was "paid" to sell out petitioner's case to PB-KBB. The record of the FMS&RC could not permit the conspiratorial judgment to be entered against the petitioner. The record would contradict with the conspiratorial scheme that was used to enter the "fraudulent judgment against the petitioner". The collusive "motions in liminie" were filed to achieve that fraudulent end. This is also a direct evidence that the Harris County judgement was entered " **BY FRAUD ON THE COURT & WAS NOT ON THE MERITS",** which could not have any preclusive effects on any subsequent action by the petitioner. There is absolutely no record anywhere which will show that petitioner discovered these and introduced these evidences in any prior proceeding. So the judgements entered in the instant case in the Courts below were against the evidence on record and without any legal basis.

So the judgements of the Courts below do not comply with the due process requirements of the Fifth and Fourteenth Amendments of the U. S. Constitution.

Petitioner also discovered that Robert Wood submitted his "pretrial motion" in the Harris County Court designating PB-KBB's employee Mahmud Mirza as an expert witness for the petitioner, without his knowledge, authorization or permission. This is a new evidence and was never discovered or

introduced before. These are the " smoking guns " which led to the instant action against PB-KBB et al and Robert Wood for conspiracy and collusion and fraud on the Court when they obtained the judgment in the Harris Court.

Petitioner also introduced evidence showing that Robert Wood abused the trial calender of the Harris County Court in order to keep petitioner in California so that PBKBB could introduce false, fraudulent, and contradictory evidence to the Jury. PB-KBB , in conspiracy and collusion with Robert Wood, controverted its prior stands and testimonies in the Harris County Court.

There are a number of evidence introduced in the instant action, showing a pattern of cover-ups, concealments, perjuries and obstruction of justice by PB-KBB in its prior litigations. Petitioner also introduced evidence of mail and wire frauds by PB-KBB and Robert Wood both, after Robert Wood sold out petitioner's case to PB-KBB. These are newly discovered evidence.

Petitioner also introduced evidence that an Attorney by the name of Lydia Clay-Jackson made unauthorized appearance on behalf of the petitioner and acted in collusion with PB-KBB during the trial and afterwards. Petitioner also showed that Robert Wood' designation of a PB-KBB's employee, Mahmud Mirza, as petitioner's expert witness(?) is another evidence of collusion. These are also newly discovered evidence.

FACTUAL DISCUSSION

PB-KBB & PBQ&D had been hired by BMI and by the Department of Energy to be the architect for three nuclear waste isolation shaft projects in June, 1982, under Contract No. E512-08900R. The contract is for providing construction drawings and for engineering oversight during construction in salt formations. Petitioner was one of the employees working for PB-KBB at the time of receiving the contract. **Petitioner determined that the said design can start only after the determination of explosive and noxious gas(es) occurring in the geological formations.** From the gas occurrance data, as per the contract specifications, the contractors are required to provide the government how much air and what pressures it would need to circulate at various life stages of the project in the subsurface facilities. The data, **known as pressure-quantity data** are required for the beginning of excavation, after 2 years of excavation, after 4, 6, 8----years of excavation, and at the end of the project life. Petitioner noticed that Battelle as the prime contractor for the Government, did not provide the gas occurrance data to PB-KBB in order for it **to calculate how much air need to be circulated and** what size equipment will be necessary in order to accomplish the contracted for design. The Government needed the data in October, 1982, to place order for the mine ventilation fans. The data is also used to determine how many shafts need to be built, the diameter of the shaft(s), size of the

underground roadways, amount of excavated materials those can be removed per day. This data is essential to start the engineering design process. The whole contract was given for this type of vital information. PB-KBB is not a mining engineering contractor, did not have the expertise in the field and lied to the government about their qualification and background while bidding for the contract. Petitioner wrote PB-KBB about the lack of essential gas occurrance data without which the design work could not be started. There were hosts of other information needed to be corrected, or amended or modified in order to get the design work started. These were the pre-requisites. **Without these data no further step could be taken in the contracted for design**. PB-KBB fired petitioner and submitted a fraudulent preliminary design to the government , after one year of its due date, by assuming to circulate 27,000 cubic feet of air per minute (cfm).

This submission or any of PB-KBB's submissions did not meet the contracts specifications and the government could not use the them. PB-KBB then submitted a fraudulent so-called "final design" , after about 5 years of its due date, to the government, again by assuming 224,000 cubic feet of air per minute (cfm) to circulate through the underground excavations. The government was supposed to place orders for long lead equipment with the vendors in order to have the facilities constructed in a timely manner. In such a situation, the initially ordered equipment to handle 27,000 cfm

air, needed to be changed to the so-called fraudulent finally designed equipment to handle 224,000 cfm of air. The inital size of the shaft, roadways, tunnels and all facilities are fraudulently specified to the government for handling 27,000 cfm of air. Then the so-called finally designed shafts, roadways, tunnels, facilities and equipment fraudulently specified to handle 224,000 cfm of air. The design specifications had to be already upgraded by almost 10 times (from the assumed size equipment to handle the 27,000 cfm air to the assumed size to handle 224,000 cfm of air). But the gas occurrance data could require one million cubic feet of air per minute (cfm) or more to be circulated per minute in order to have the explosive gas diluted. Defendants failed to tell the Government how much explosive gas is in the geological strata and how much air needs to be circulated per minute in order to have that gas diluted and made harmless at various stages of project life. These are vital contract requirements on which PB-KBB defrauded the United States.

Not a single persons employed by either PB-KBB or Battelle have ever designed such contracted for facilities. Not a single line of contractors' design submission to the Government was honest, scientific or complied with the contract specifications. Obviously the fraudulently specified equipment and facilities could not do the contracted for job. As a direct and foreseeable result of fraudulent bidding and performance, the project collapsed and government did not receive a single piece of paper

which it could use in the future or at any time. The six -seven years (1981 -1988) of fraudulent bidding, repeated contract signing and repeated fraudulent submission of contract performance resulted in the loss of the whole project

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Introduction

The findings of the District Court is totally inconsistent with the facts, pleadings and with the evidence on record. The decision of the District Court and that of the Circuit Court directly contradicted with their own holdings, with those of the of other circuits, with those of the Texas Supreme Court and with those of this Court. The record will show that petitioner's case was never decided on the merits and petitioner could never present his case to a jury because of the frauds on the Court and due to a pattern of fraudulent concealments, which the defendants started in the Texas State Court and continued till to date. Petitioner was unaware of the collusive frauds on the Court, unaware of the fact that his issues were never presented to the jury by his ex-attorney, after receiving payments from PB-KBB. Defendants were covering up of their fraudulent conducts by repeated frauds, perjuries, by misrepresentations and by abusing the various privileges afforded under the Federal Rules of Civil Procedures. In normal circumstances, defendants will be subject to sanctions for their abusive conducts.

This Court is required to upheld the due process requirements of the U.S. Constitution. The Courts below rewarded defendants for their misconducts in litigations.

This Court should also exercise jurisdiction because the Fifth Circuit, without explanation, declared petitioner's claims against his ex-attorney, Robert Wood, res judicata. This holding is totally unlawful and is violative of the due prequirements of the Constitution.

This Court's power of supervision should also be exercised with respect to the Fifth Circuit's unlawful granting the cost of litigations to the defendants along with their attorneys' fees, amounting to $ 9,356.25, notwithstanding the facts that these attorneys were engaged massive frauds on the courts, perjuries, cover-ups, concealments and numerous other misconducts. Needless to say this sort of behaviors by the attorneys are not conducive to a healthy judicial process and must not be rewarded at all.

1. VIOLATION OF RICO ELEMENTS NOT DISCOVERED PREVIOUSLY

From the litigation history and defendants' conducts, as described above amounted to a pattern of cover-ups, concealments, obstruction of justice, perjuries to material facts, repeated mail and wire frauds violated the provision of Racketeer Influenced and Corrupt Organizations Act, (RICO), 18 U. S. C. § **1961 et seq.**

Further, in order to comply with the due process requirements of the Fifth Amendment and Fourteenth Amendments of the United States Constitution, the Courts below were required to impose sanctions under Fed R. of Civil Proc. § 11, § 37, & § 56(g), for each of the predicate acts. The Courts below did not even consider the culpiability of the defendants as actionable, and that is why the judgments entered below did not meet the due process requirements.

The predicate acts petitioner relies on his RICO injuries are (1) a pattern of obstruction of justice, perjury, concealments, cover-up & conspiracy (2) mail frauds and (3) wire frauds.

1. Having devised a scheme to perpetrate collusive frauds on the Harris County District Court, Robert Wood & PB-KBB used mail and telephone to defraud petitioner by submitting two "motions in limine" eliminating all of his claims against PB-KBB in September, 1989. Petitioner discovered the collusive frauds, elimination of issues and claims from the Harris County Court trial on October 8/9 1989, in the second week of October, 1996. PB-KBB et al admitted the perpetration frauds in the Harris County Court in their brief to the Circuit Court, which, under oath, they repeatedly denied during prior litigations.

2. PB-KBB, as outlined above, corruptly persuaded Robert Wood, to withhold records, documents and evidences, collected for submission, from the Harris County District Court in September, 1989, in violation of 18 U. S. C § 1512(b), in order to defraud the petitioner. This is a direct evidence of obstruction of justice.

3. PB-KBB, as outlined above, corruptly persuaded Robert Wood to use mail and wire frauds to hinder and delay petitioner to attend the trial of his case in the Harris County Court in September, 1989, in violation of 18 U. S. C. § 1512(c), 18 U. S. C. § 1341 and 18 U. S. C. § 1343, so that it could present unauthorized testimonies perpetrated to be on behalf of the petitioner by a PB-KBB's employee, and so that it could present false and fraudulent testimonies, contradicting its prior stands taken in the FMS&HRC proceeding, to the Jury during petitioner's absence.

4. Robert Wood, after earning petitioner's trust during the FMS&HRC proceeding, changed side, used the mail and

telephone, from May, 1989 through October, 1989, and afterwards, defrauded the unsuspecting petitioner by selling his case to PB-KBB, hindered and delayed petitioner from attending his case which was undergoing trial. Petitioner did not realize Robert Wood's change of side, did not discover the scheme under which Robert Wood was operating, until October 8/9, 1996.

5. PB-KBB, corruptly persuaded Robert Wood to abuse the Harris County District Court's trial calender, abused the mail and wire, in order to keep petitioner away from the trial, so that they could enter the fraudulent judgment against petitioner in that Court. PB-KBB actively persuaded a conspiratorial scheme of continuing cover-ups, concealments and obstruction of justice and frauds on the Courts. Robert Wood even failed to send petitioner a copy of the fraudulent judgment he conspired to enter against petitioner in that Court.

6. PB-KBB, corruptly used mail to defraud petitioner to send the fraudulent and so-called "FINAL JUDGMENT" to Lydia Clay-Jackson, who appeared in the Court unauthorized and without the knowledge of petitioner, in violation of Texas Court Rule no 12, by pretending to representing him.

7. Lydia Clay -Jackson was acting in collusion with PB-KBB, and appeared unauthorized in the county District Court, in appeals Court and in Texas Supreme Court, pretending to be representing petitioner. As a matter of fact, plaintiff was never represented by anyone starting from June, 1989, when Robert Wood changed side, until the case went though the Texas Supreme Court. **Hence judgment entered in those Courts are void**. PB-KBB abused the mail system while those judgments were entered against petitioner.

8. Use of mails by PB-KBB et al to defraud the petitioner while defending in the U.S. Courts in **H-92-2429** on October 10, 1993, against his qui tam claims, by submitting under Fed. R. of Civ. Proc. §12(b)(6) the fraudulently obtained

judgment and claiming res judicata, the act of which is also the part of a pattern.

9. Use of mails by PB-KBB et al to cover-up their misdeeds in the Harris County Court, filed fraudulent objections in response to petitioner's written interrogatories under **H-92-2429**, on 1/24/94. At this point Battelle joined in with PB-KBB et al's cover-ups and concealments, obstruction of justice. In fact, Battelle and PB-KBB et al submitted joint briefs in the Circuit Court and in the Supreme Court and is jointly liable under **RICO**.

10. Use of mails by PB-KBB et al, to defraud petitioner and the United States, while submitting two perjurious affidavits from their corrupt attorneys, in the U.S. Court, in support of their fraudulent motions for summary judgment, under Fed. R. Civ. Proc. §56 (b).

11. Petitioner in July, 1995, found some inconsistencies as noticed by petitioner by that date in PB-KBB's stands taken in the FMS&HRC proceeding and in their State Court proceeding in 1989. Petitioner brought a motion in 7/19/95 in the U.S. Court under Fed. R. of Civ. Proc. §60(b) based on those inconsistencies. Both Battelle and PB-KBB et al again used the mail service to file motions by covering up their misdeeds in the State Court, which also was part of a pattern. PB-KBB et al cited in their motion under FRCP . §12(b)(6) that they perpetrated "intrinsic fraud" in the State Court and Federal Court did not have subject matter jurisdiction to grant Petitioner's motion. That citation, as petitioner discovered afterwards in October, 1996, is false, fraudulent, misleading and was designed to obstruct justice. The U.S. Court denied petitioner's Fed. R. Civ. Proc. § 60(b) motion citing "based on applicable laws, rules and regulations", because the inconsistencies took place in the State Court case no. 87-30221, in 1988 and in 1989, about 6 years prior to filing the Fed. R. of Civ. Proc.§ 60(b) motion

in the Federal Court. The Court did not rule on the merits of the evidence while denying petitioner's motion.

12. Needless to repeat the numerous times, PB-KBB et al as well as Battelle used the mails, while submitting fraudulent defenses, disregarding the Fed. R. of Civ. Procs. requirements, to cover-up, conceal the facts behind their fraudulently obtained judgment, in order to defraud petitioner, in the U.S. District Court, in the appeals Court and in this Court, until June/July, 1996.

Petitioner discovered the causes of his these injuries in October, 1996 and defendants admitted in their briefs this time in the Fifth Circuit Court of Appeals that they obtained the original judgment by frauds. However, they repeatedly violated the provisions of RICO while defending against petitioner's claims prior to their admittance this time. These are part of a pattern of defendants' defenses.

2. The District Court issued its erroneous judgment by presuming that the instant action is not distinguishable from petitioner's prior Fed. Rule of Civ. Proc. §60(b) motion.

The Present case is distinguishable from prior litigations on the following grounds:

The present case is distinguishable from the previous cases in several ways. **First,** it is based on extrinsic frauds, which were not discovered or known during prior litigations;

Second, it is based on evidences that defendants practised a pattern of cover-ups, fraudulent concealments, repeated perjuries to material facts, repeated obstruction of justice, mail frauds, racketeering during litigations, and repeated abuse of the privileges afforded under Fed. Rules of Civ. Procedures;

Third, it named petitioner's ex-attorney, Robert Wood, as a defendant for conspiracy and collusion with PB-KBB, and

selling out petitioner's case to PB-KBB, and for the abuse of process during the State Court litigations;

Fourth, the present case alleges that an attorney, Lydia Clay-Jackson, fraudulently and without authority appeared to represent petitioner and connived at his defeat; **Under Texas Court Rule 12, unauthorized appearance of Attorney Lydia-Clay Jackson have rendered the Harris County judgment VOID, and it should not have had any preclusive affect during subsequent litigations. Defendants fraudulently concealed that fact during prior litigations.**;

Fifth, it is based on evidence that Robert Wood, in collusion with PB-KBB, failed to or refused to bring the issue of PB-KBB's refusal to rehire petitioner back, after making several contacts, because he filed a complaint with MSHA, on their fraudulent and criminal design. This is an issue in itself. The elimination of this issue under the fraudulent collusive motions of lemini was not discovered during prior litigations and PB-KBB was repeatedly covering-up by frauds & perjuries. As a result this issue was never litigated and petitioner could not bring it up during earlier litigations.

Sixth, PB-KBB, in collusion with Robert Wood, took inconsistent positions in the Texas State Court, than what they took in the prior FMS&HRC proceeding. Petitioner did not discover the collusion element in this unpermitted opportunity provided to PB-KBB by Robert Wood. Petitioner followed the rule of law as outlined in the Restatement of the Law of Judgment, Second, chapter 1, Introduction, pp-4-5, which discusses about the inconsistent position in litigations.

Seventh, Petitioner now determined that he was prevented from exhibiting fully his case during the State Court trial, due to the aforesaid collusion;

Eighth, Petitioner determined that Robert Wood, under the fraudulent pretense of representing petitioner, used frauds, misrepresentations, deception, pattern of wire frauds, to keep petitioner away from the State Court, in order to benefit PB-KBB, during PB-KBB's fraudulent presentation to the Jury. This pattern of using wire for fraudulent purpose, from Texas to California, is a violation of RICO, which was not discovered earlier.

3. The Fifth Circuit Court erred in the applicable rules of discovery of causes of actions and on their accruences.

Both, the district and the Circuit Court disregarded the rule of accrument of cause of action under the discovery rules and under the separate accruel rules in the following areas: (1) Discovery Rule in case of fraud on the Court, where one's own attorney sells his case; (2) Discovery Rule under RICO, when the cause accrues at the time of discovery by the plaintiff; (3) Separate accruel rules applied under RICO as the plaintiff discovers his injuries; (4) Discovery rule under the fraudulent concealment doctrine; (5) Discovery Rule as applicable in Texas, when a tort is perpetrated by breaking the fiduciary duties by one's own attorney. Petitioner's claims could not become res judicata, prior to their discovery.

The cause of this action did not accrue prior to petitioner's discovery of his ex-attorney's breach of fiduciary duties, selling out of his case to PB-KBB and his tortious conducts of abuse of the process, Willis v. Mavrick, 760 S.W.2d. 642. There is absolutely no evidence anywhere which show petitioner knew about it and petitioner never sued Robert Wood before. Petitioner needed all the evidences he could use to prosecute his claims against Wood. The District Court dismissed petitioner's claims arbitrarily saying that a district judge "can dismiss a case", citing a case which was dismissed for lack of prosecution. The Circuit Court dismissed petitioner's claims against Wood for a different reason, citing res judicata, even though Wood was never a

party in litigation against petitioner, neither he was in privity with anyone in litigation against petitioner. Petitioner has a written agreement with Robert Wood and he is entitled to enforce his agreement.

Under RICO, a cause of action accrues as the plaintiff discovers his injuries; Bingham v. Zolt, C. A. 2 (N.Y.) 1995, 66 F. 3d. 553, certiorari denied, 116 S. Ct. 1418, 134 L. Ed. 2d. 543. Petitioner discovered his in October, 1996, when he discovered the two collusive motions in limine, which evidence of cover-ups, concealments, conspiracy and obstruction of justice. At the same time he determined a pattern of obstruction of justice and mail frauds used by PB-KBB. He also determined in October, 1996, that Robert Wood used a pattern of mail and wire frauds in obstruction of justice to keep petitioner away from the Court when his case was being heard by the jury. RICO claims are subject to separate accruel rule; Bankers Trust Co. v. Rhoades, 859 F. 2d 1096, 1105, (2nd Cir. 1988). Each time plaintiff discovers his injuries, new claim accrues. The Courts below erred in disregarding the Supreme Court's position on accruel of RICO claims.

4. PETITIONER'S RULE 60(b) MOTION DID NOT HAVE ANY PRECLUSIVE EFFECT ON HIS INSTANT ACTION.

Both the District Court and the Circuit Court erred by holding that whatever evidence petitioner produced during the Fed. Rules of Civ. Procedure § 60(b) motion in H-92-2429, in the U. S. Court in 1995, preclude him from using to set aside the State Court judgment entered under 87-30221. Petitioner contends that those evidences are not res judicata for two separate reasons: (1) Rule 60(b) motions are part of the case under litigation. The usual procedure to remedy any problem in a judgment is by motion in the court and in the action in which the judgment was rendered; **Federal Rules of Civil Procedures § 60 (b), Wright Miller & Cane:**

Federal Practice and Procedure: Civil 2d § 2851 at 229. Moor's Federal Practice 3D: § 60.21 (2) at pp 60-201/202, §60.60 at pp 60-190, 191 &192; § 60.65 (2) at p-60-200. These rules cannot be used to set aside judgments in a different case in a different Court. So whatever evidence used under Rule 60(b) motion the U.S. Court cannot become res judicata to set aside the State Court judgment under 87-30221. Because many circuits, including the Fifth and this Court did not allow to bring a Rule 60(b) motion to set aside a judgment in a different Court. So those evidences are not res judicata in the instant case, see Bankers Mortgage Co. v. United States, 423 F. 2d 73, 78 & n. 9 (5th Cir.), United States v. Shaugnessy, 175 F. 2d 211, 212 (2nd Cir, 1949)., Craver v. Faurot, 64 F. 241, reversed, 76 F. 257, cert. dismissed, 162 U.S. 435, 16 S. Ct. 799, 40 L.Ed. 1030.

These courts held the view that a bill of review does not invoke original jurisdiction but is for that purpose a continuation of the former litigation.

(2) Further, this Court has strictly enforced the rule that under Rule 60(b) (1), (2) and (3), a motion cannot be brought **one year after entry of the judgment**, see Ackermann v. United States, 340 U. S. 193, 197, [1950], 71 S. Ct. 209, 211. The time restriction is absolute and controlling; **Moore's Federal Practice 3D: § 60.65(2)(a) at pp-60-200/201.** The State Court judgment was entered in September, 1989. Obviously a Rule 60(b) motion cannot brought even in the State Court, if that is allowed, in 1995. That is why res judicata was erroneously applied in the District Court as well as in the Circuit Court to preclude petitioner's evidences used in Rule 60(b) motion.

Further, under the savings provision of the Rule 60(b) motion, petitioner is entitled to this independent action and use those evidences.

Further, the instant action was not brought with the prior discovered evidences. This action is brought by evidences discovered **after** the prior litigation. So this cause of action did not accrue during prior litigation, as described under the rules of discovery. So petitioner's claims are erroneously barred by using res judicata.

5. ISSUES ELIMINATED BY COLLUSION FROM THE COURT RECORD AND WERE NEVER TRIED BEFORE

(a) PB-KBB made a "confession in an open Court" that they are not mining engineers, they are architects. They draw drawings and if they can draw drawings they do not care what the Government does with the project. The subject contract needed more than drawing. The confession that they are not mining engineer, alone, without more, will make them liable to the United States and to petitioner, under the False Claims Act, 31 U. S. C. § 3730(b). This is because they have lied to the Government in their bidding document saying that they are expert mining engineers. The 1986 amendment of **the False Claims Act**, 31 U.S.C.§3729 et seq. ,made it actionable to receive Federal contract by falsifying bidding documents

(b) The issue of contacting petitioner back, after firing, for rehiring, and then refusing to hire after learning of his complaint to MSHA, is actionable under the **False Claims Act**, 31 U.S.C. § 3730(h). This issue was also eliminated from the Harris County Court Record **by the two collusive motions in limine.** This issue cannot be precluded during subsequent litigations, by declaring res judicata, when PB-KBB conspired with Robert Wood to buy out petitioner's case. This issue, as already Stated, was not discovered during prior litigations.

6. PETITIONER'S CLAIMS AGAINST ROBERT WOOD WAS UNLAWFULLY PRECLUDED IN

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH & FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION.

Petitioner has a written agreement with Robert Wood, which is on record. As a citizen of this country, petitioner has a fundamental right to make contracts and enforce contracts. These fundamental rights are guaranteed under the Constitution and under Federal Statutes. The District Court dismissed petitioner's claims against Wood saying that a district judge can dismiss a case, citing a case which was dismissed due to lack of prosecution. However, that is not the case here. The District Court then imposed injunction against petitioner in enforcing his contract.

The Fifth Circuit Stated petitioner's claims against Robert Wood were precluded by res judicata, even though Robert Wood was never a party in any prior litigation, neither he is privy to any party in any prior litigations against the petitioner. Obviously, both the District Court and The Fifth Circuit acted unlawfully deliberately disregarding the petitioner's rights guaranteed under the Fifth and Fourteenth Amendments of the U.S. Constitution. This Court is required to enforce its supervisory authority over the Fifth Circuit Court's unconstitutional conducts.

7. REMOVAL WAS UNLAWFUL AND PETITIONER DID NOT WAIVE HIS RIGHTS TO REMAND TO THE STATE COURT.

Under the removal statute, whenever a case is removed because the cause of action was brought under the Constitution, laws and rules of the United States, **ALL SERVED DEFENDANTS MUST JOIN THE REMOVAL PETITION**, otherwise the U.S. Court will lack subject matter jurisdiction to try the case, see Highway Construction Co. V. McClleland, 14 F.2d 406, certiorari denied, 273 U.S.

765, 71 L. Ed. 81, 47 S. Ct 570. In hear, Robert Wood, who is a defendant under the False Claims Act and under RICO, did not join the removal petition. For that reason, the U.S. Courts did not have the subject matter jurisdiction to enter any judgment in this case.

The removing defendants' mailing of the notice of bulky notice of removal via certified mail reached petitioner on 4/4/97, 8 days after the filing of the notice on 3/27/97, in the Court. The removal statute, 28 U. S. C. §1446(d) **requires prompt notification to petitioner of removal by the defendants.** This 8 days delay in mail delivery did not meet the statute's **prompt notification mandate**. That is why the case should be remanded upon petitioner's motion filed on 4/3/97; 26 days after receipt of the notice of removal. Petitioner's 30 days time to file the motion to remand is **equitably tolled** due to defendants' noncompliance of the statute's mandate. That is the Court below erred by holding that petitioner waived his rights to remand by not filing by 4/29/97. and filing by 4/30/97.

Now, if this Court overturns its prior holding in identical cases, and let Robert Wood's filing of a motion for a jury trial in the Federal Court on 4/7/97, satisfies the removal requirements, then petitioner's motion to remand filed on 4/30/97, **is filed timely.** Robert Wood filed his motion on 4/7/97 and petitioner filed his motion to remand on 4/30/97, only 23 days after Robert Wood's filing. Thus petitioner did not waive his objections in the defects in removal, and case should be remanded in the State Court.

Further, defendants waived their rights of removal by litigating the case in the State Court on or before March 26, 1997. Rosenthal V. Coats, 148 U. S. 142, 13 S. Ct. 576, 37 L. Ed 397, (1893). Their rights were waived first. Petitioner did not waive any of his rights because defendants' prior non-compliance. Petitioner did not waive his rights of

objections of defect of removal. The Circuit Court erred in its ruling.

The claims under the False Claims Act and under RICO are not separate and independent in this case under 28 U. S. C. §1441 (c) . Thus the case is not removable and the Court below did not have the subject matter jurisdiction to try the case and it must be remanded to the State Court, after vacating the judgment.

8. WOULD THE STATE COURT REACH THE SAME CONCLUSIONS ON THE ISSUES AS DESCRIBED, OR WOULD REACH DIFFERENT CONCLUSIONS? IN THAT CASE, UPON REMOVAL, PETITIONER'S DUE PROCESS RIGHTS ARE VIOLATED BY ABUSE OF THE PROCESS.

The Courts below abused the removal statute by unlawfully treating the case as it did. The Congress never intended that removal statute be used to abuse the constitutional process. In Texas, judgments entered by frauds on the Courts are regularly set aside. That did not happen here.

In Texas Courts, petitioner will be allowed to press his claims against Robert Wood for selling his case, for abuse of the process and for breach of fiduciary duties.

In Texas Court, due to Lydia Clay-Jackson's unauthorized appearance, the Harris County Judgment would be set aside, because it is void.

In Texas Court, the judges would at least read the pleadings, here it did not happen. Petitioner responded to each of the issues raised by the defendants in Doc. # 17, which the Court has seen and denied. She then wrote in her opinion that petitioner did not specifically respond to the defendants' issues raised. The Petitioner responded to the issues raised but the judge failed to read the pleadings, denied it and then said the issues are not responded to. The Judge also did not look at the submitted evidences and said the case is not

distinguishable, which is not the case. The conclusion should be that the judge did not read the pleadings, did not examine the evidence and arbitrarily issued the ruling.

A Texas State Court will not act that way. That is why Petitioner's due process rights are violated, upon removal of the case and it should be remanded back to the State Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and exercise its jurisdiction. The judgments of the Court below need be vacated because they have been entered , arbitrarily, capriciously, unlawfully and without subject matter jurisdiction. The case need be remanded to the State Court.

Respectfully submitted

Dilip K. Paul

Dilip K. Paul

Petitioner, Pro Se

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APPENDIX A1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20814
Summary Calendar

DILIP K.PAUL, FILED JULY 10, 1998

Plaintiff-Appellant,

versus

PB-KBB, INC.; PARSON, BRINKERHOFF, QUADE & DOUGLAS, INC.; BATTELLE MEMORIAL INSTITUTE (Project Management Division); ARSON D. PHIPPS; ROBERT M. WOOD; PAUL BOULON.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC NO. CA H-97-1004

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges

PER CURIAM:*

Dilip K.Paul has appealed the District Court's orders refusing to remand this action, which was removed from the State Court, and dismissing the action under the doctrine of res judicata.

IT IS ORDERED that appellees' motion for leave to supplement their brief with a copy of a motion filed by Paul in a prior Federal action is GRANTED. Paul's motion for leave to supplement the record on appeal with the record from the appeal in the prior Federal action is DENIED.

Paul's nonjurisdictional challanges to the removal were waived by his untimely remand motion. see Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 566 (5th Cir. 1995). Essentially for reasons Stated by the District Court, we hold that the District Court did not err in finding that Paul's claims are barred under the doctrine of res judicata. See United States wx rel. Paul v. PB-KBb, Inc., No. H-97-1004 (S.D. Tex. July 1, 1997). Because the appeal is frivolous, it is DISMISSED. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. R. 42.2

Appelles have moved the Court for an order requiring Paul to pay their damages and costs. Paul was previously warned that the filing of frivolous appeals would result in the imposition of a sanction. IT IS ORDERED that the appellees' motion is GRANTED. Fed. R. App. P. 38.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Paul must reimburse the appellees for their costs and reasonable attorneys' fees incurred in pursuing this appeal. Appelees should move the District Court for an order determining their costs and fees. Paul's motion for a sanction against the appellees is DENIED.

APPEAL DISMISSED; APPELLEES' MOTIONS GRANTED; APPELLANT'S MOTIONS DENIED.

APPENDIX 2

IN THE UNITED STATESS COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20814
Summary Calendar

DILIP K.PAUL,

FILED SEP 21, 1998

Plaintiff-Appellant,

versus

PB-KBB, INC.; PARSON, BRINKERHOFF, QUADE & DOUGLAS, INC.; BATTELLE MEMORIAL INSTITUTE (Project Management Division); ARSON D. PHIPPS; ROBERT M. WOOD; PAUL BOULON.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 07/10/98, 5 Cir.,_____, _____ F.3d_____)

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges.

PER CURIAM

Treating the Suggestion for Rehearing En Banc as a Petition

for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED, R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

Signature- Not legible

United States circuit Judge

APPENDIX A3
IN THE UNITED STATESS DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTONDIVISION

UNITED StateS OF AMERICA,
ex rel. DILIP K.PAUL
Plaintiff

v. CA NO. H-97-1004

PB-KBB,INC., et al.,
Defendants

MEMORANDUM OPINION AND ORDER

This action is the fifth in a series of related lawsuits brought by Plaintiff Dilip K.Paul ("Paul") against his former employer, PB-KBB, Inc. ("PB-KBB"), and other related Defendants. In this action, Paul has sued PB-KBB; Parsons,Brinkerhoff, Quade &Douglas, Inc.("PBQ&D"); Battelle Memorial Institute, Project Management Division ("BMI"); Robert M.Wood ("Wood") (Paul's attorney in previous lawsuits); Arson D. Phipps ("Phipps") (PB-KBB's attorney in the previous lawsuits); and Paul Boulon ("Boulon") (a PB-KBB employee).1

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1. PBQ&D and BMI (two corporations that entered a contract with PB-KBB related to Paul's underlying complaint) have been Defendants in the previous lawsuits initiated by Paul. However, this is the first action that Paul has filed against Defendants Wood, Phipps, and Boulon.

Paul brought the current action in State Court, and on March 27, 1997, Defendants PB-KBB,PB&QD, BMI, Phipps and Boulon removed the action to this Court. [2]

In the three months that have elapsed since the action was removed, Paul has filed three motions to remand, *see* Motions to Remand [Docs. #14 and 22] and "Cross Motion to Remand & to Issue Summary Judgment" [Doc.# 31] [3]; three motions for summary judgment, see "Motions for Summary Judgment &Estopples" [Doc.#16, 19, and 20];[4]; and one "Motion for Estoppels" [Doc. # 17]. [5]

All Defeendants except for Wood have filed Motions to Dismiss. See Defendant BMI's "Motion to Dismiss Based on Res Judicata" [Doc.#8] [6] and Defendants Pb-KBB, PBQ&D, Phipps, and Boulon's "Motion to Dismiss or, In the Alternative, for Summary Judgment" [Doc.# 10].[7] Defendants contend that all of Plaintiff's claims in this lawsuit are barred by res judicata and that plaintiff has continued to file firvolous lawsuits and motions for the purpose of harassing Defendants.

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2. Defendant Wood did not join in this removal. See Notice of Removal [Doc.# 1]. However, through his later filings with this Court, including a Jury Demand, Wood has demonstrated his consent to removal. See infra Section II.

3. Defendants oppose these motions. See " Federal Defendants' Joint Response in Opposition to Dilip K. Paul's Motion to Remand and Motion to Remand for Lack of Jurisdiction" [Doc .# 23] and " Federal Defendants' Joint Response in Opposition to Dilip K. Paul's Third Motion to Remand" [Doc. #26].

4. In response to these motions, Defendant Wood has filed a Response. See Wood's "Opposition to Plaintiff's Motion for Summary Judgment" [Doc. # 21]. The other defendants have

requested that the Court defer ruling on Plaintiff's summary judgment motions until the Court has considered Defendants' Motions to Dismiss. See BMI's "Motion for Continuance of Plaintiff's Motion for Summary Judgment" [Doc. #25], and PB-KBB, PBQ&D, Phipps, and Boulon's "Motion for Continuance of Plaintiff's Motions for Summary Judgment" [Doc. # 27].

5. Defendants also claim that Plaintiff filed a fourth motion to remand on May 5, 1997, as well as a Motion for Contempt. See Letter dated May 21, 1997, and "Response of PB-KBB, et al. to Motion for Contempt of Plaintiff" [Doc. #32]. However, the Court's file does not contain these motions.

6. Paul responded to BMI's motion with a "Motion for an Order to Deny BMI's Motion to Dismiss" [Doc. # 15]. In reply, BMI filed a "motion for an Order Denying BMI's Motion to Dismiss" [Doc. # 24]. In surreply, Plaintiff filed a "Response to Federal Defendants' Responses of May 14,, 1997 & Motion" [Doc. #28].

7. Plaintiff has not filed specifically responded to this motion.

After reviewing the motions, the responses and replies, the relevant authorities, and all other matters of record in this case, the Court concluded that all of Plaintiff's claims in this lawsuit are barred by res judicata. For the reasons Stated below, Plaintiff's Motions to Remand are **DENIED**, and Defendants' Motions to Dismiss are **GRANTED.** Although Defendant Wood has not yet filed a motion to dismiss, the Court dismisses sua sponte Plaintiff's claims agains him. [8] In addition, Plaintiff's Motions for Summary Judgment, as well as Paintiff's "Motion for Estoppels" are **DENIED**, and Defendant's Motions for Continuance are **DENIED AS MOOT**. Finally, the Court determines that Plaintiff should pay Defendants' costs incurred in defense of this action, including reasonable attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

In May 1981, Paul began work for Defendant PB-KBB as an engineer. See Memorandum of Law in Support of PB-KBB, et al.'s Motion to Dismiss ("PB-KBB's Motion to Dismiss") [Doc. # 11]. at 3. In June 1982, Paul began working on a project, pursuant to a subcontract which PB-KBB entered into with Defendants BMI and PBQ&D, to design nuclear waste disposal shafts for the United States Department of Energy. *See* id. at 2-3. During the course of his work on the project, Paul concluded that the preliminary design specifications for the shafts were inconsistent with Federal mine safety standards. After Paul informed his supervisors both orally and in writing of his conclusion, PB-KBB discharged him from employment. *See* id. at 3-4. In the

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8. A District Court may dismiss a case upon its own motion, *See* Colle v. Brazos County, 981 F.2d 237, 242-243 (5th Cir. 1993).

Fifteen years since then, Paul has filed a series of lawsuits protesting his discharge from PB-KBB and raising a variety of allegations regarding the nuclear waste disposal project. These lawsuits are described below.

Paul I-- In 1983, Paul brought a Title VII claim against PB-KBB in Federal Court for wrongful discharge based on his national origin (Civil Action No. H-83-3409) (S.D. Tex.)) The following year the parties settled that suit, and the action was dismissed without prejudice. *see* PB-KBB motion to Dismiss, at 4.

Paul II-- In 1985, Paul filed an action with the Secretary of Labor pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 801, et seq. ("Mine Act"). In that action, Paul claimed that PB-KBB fired him in retaliation for whistle blowing in violation of 815(c)(1) of the Mine Act. The Secretary of Labor concluded that because paul did not work in a "mine," his claim did not fall within the protection of the Mine act. Paul appealed to the Federal Mine safety and Health Review Commission, which upheld the Secretary of Labor's decision. Paul then appealed to the Circuit Court of appeals for the District of Columbia, which affirmed the Commission. Paul also petitioned for a writ of cirtiorari to the United States Supreme Court, which was denied. *see* Paul v. Federal Mine Safety and Health Review Comm'n, 812 F.2d 717 (D.C. Cir.), cert. denied, 483 U.S. 1023 (1987).

Paul III--Next, Paul brought an action in Texas State Court alleging that he was wrongfully discharged for his unwillingness to commit a criminal act. In that action, Paul argued that the preliminary design for the nuclear waste disposal shafts could have killed people and that, therefore, had he certified the design plans as PB-KBB demanded, he would have committed reckless conduct in violation of Texas Penal Code 22.05. At trial, a jury reached a verdict for the Defendants, finding that Paul's purported refusal to commit

an illegal act was not the sole reason for his discharge from PB-KBB. The Texas Court of Appeals affirmed the judgment for Defendants, and the Texas Supreme Court denied Paul's petition for a writ of error. see Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229 (Tex. app.--Houston [14th Dist.] 1990, writ denied).

PAUL IV--Next, Paul brought two separate pro se actions in Federal District Court, one against PB-KBB and PBQ&D and the other against BMI. These actions were consolidated as United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370, 371-72(S.D. Tex. 1994) (Hittner, J.), aff'd, 53 F.3d 1282 (5th Cir. 1995), cert. denied, 116 S.Ct. 817 (1996). Paul sued on behalf of the United States for the defendants' alleged violation of the False Claims Act, 31 U.S.C. §3730. Paul claimed that the defendants "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the Government. .. . a false or fraudulent claim for payment or approval," 31 U.S.C. §3729(a)(1), with respect to nuclear waste disposal shafts. Id at 371-72. [9]

Judge Hittner granted PB-KBB and PBQ&D's motions to dismiss based on res judicata and dismissed Paul's claim against BMI sua sponte. Id. at 371. In his opinion dismissing the case, Judge Hittner held that, under the Texas law of res judicata, Paul's False Claims Act claim was barred by the prior State Court lawsuit (Paul III) because "the facts and claims in the State and Federal cases were almost identical" and therefore "the two cases could have been tried together." Id. at 375. The Fifth Circuit affirmed Judge Hittner's decision in an unpublished opinion. See 53 F.3d 1282.

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9. Although the United States had the right to intervene in that suit, it elected not to do so. See 860 F. Supp. at 371.

Undeterred by these rulings, Paul then filed a motion pursuant to Fed.R.Civ.P. 60(b), requesting that Judge Hittner set aside the judgment due to newly discovered evidence. see Attachment C. to PB-KBB's Motion to Dismiss, at 1. In this motion, Paul claimed thathe had discovered evidence indicating that the Defendants had perpetrated fraud on the Texas State Court in Paul III. see id. at 3. [10] as a result of this newly discovered evidence, Paul claimed, the Texas State Court judgment in Paul III was void, and Judge Hittner's decision in Paul IV was also void. Judge Hittner denied this motion as frivolous, and the Fifth Circuit upheld the denial, 85 F.3d 624 (5th Cir. 1996), cert. denied, 117 S.Ct. 181. *See* Attachment D to PB-KBB's Motion to Dismiss. In its opinion, the Fifth Circuit issued the following warning:

Paul is cautioned that any additional frivolous appeals filed by him will invite the imposition of sanctions. To avoid sanctions, Paul is further cautioned to review any pending appeals to ensure that they do nor raise arguments that are frivolous because they have been previously decided by this Court.
id at 4

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10. For instance, Paul claimed that PB-KBB failed to inform the Court that one of its expert witness in Paul III, Mahmud Mirza, was a "Pakistani Islamic zealot" who was not an expert on underground mines. see Attachment C to PB-KBB's Motion to Dismiss, at 3. Further, Paul alleged that newly evidence showed that Defendants had negotiated and created numerous contracts in a variety of States and counties, with the help of "illegal Canadian immigrants," in violation of contract, tort, and immigration law. see id at 15-16.

Paul V: The current action is Paul's fifth "day" in Court. On December 5, 1996, Paul filed suit in Texas State Court, seeking once again to set aside the judgment in Paul III. *See* Qui Tam Plaintiff Dilip K. Paul's Original Petition ("Original Petition"), Attachment A to Supplement to Removal Notice [Doc. # 6], at 1. Paul's allegations in this suit are indistinguishable from the claims made in Paul IV, including the Rule 60(b) motion, except that in the current suit, Paul has added an allegation that Defendants' actions violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq. (RICO) and has added Defendants Phipps, Wood, and Boulon to the list of defendants. See id. 39-44. [11] In the current suit, Plaintiff claims: (1) that Wood, PB-KBB, Phipps, and Boulon committed fraud on the Court in Paul III; [12] (2) that PB-KBB, PBQ&D, BMI and Boulon violated the False Claims Act; and (3) that PB-KBB, PBQ&D, BMI, and Boulon violated RICO. See id.

II. PAUL'S MOTIONS TO REMAND

Defendants PB-KBB, PBQ&D, BMI, Phipps, and Boulon removed this action based on Federal question jurisdiction, pursuant to 28 U.S.C. 1441(b) and (c). In his Motions to Remand, Paul makes the following arguments.

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11 Wood was Paul's attorney in Paul I, Paul II, and Paul III. Phipps was counsel for PB-KBB in paul III and Paul IV. Boulon was a contract administrator for PB-KBB during the period of the nuclear waste disposal shaft project. See Original Petition at 40.

12. for instance, Paul alleges that Wood "abuse[d] the process of the Court" by appointing Mahmud Mirza as an expert witness with the help of PB-KBB, Phipps, and Boulon, and without Paul's approval. See Original Petition at 6-7, 29-30, 41.

First, Paul argues that the "filed actions arosde out of the same set of facts and the State Court has full jurisdictions [sic] to try all the issues raised in this complaint." Motion to Remand [Doc. # 14]. Thus, Paul appears to contend that because the State Court has jurisdiction over the action, this Court should remand the case. However, simply because both the State and Federal Court may have concurrent jurisdiction over the action does not mean that the case should be remanded. Under 28 U.S.C. §1441, if Defendants can show that the action could have been brought in Federal Court, they may remove it to the Federal Court. In this case, Defendants properly invoked the removal statute because two of Paul's claims, those brought under RICO and False Claims Act, are based on Federal law and thus could have been brought originally in Federal Court pursuant to 28 U.S.C.§1331. It makes no difference to Defendants' removal that Paul's fraud claim is based on State law. Because Paul's fraud claim is part of the same case or controversy as his Federal claims (Paul admits that his fraud claim "arose out of the same set of facts" as his Federal claims, id) this Court has supplemental jurisdiction over the fraud claim, pursuant to 28 U.S.C. §1367. [13]

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13. The Parties' argumens on this issue appear to address 28 U.S.C. 1441(c), which allows the District Court discretion in determining whether to allow removal of supplemental State law claims. That section provides that:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removal claims or causes of action, the entire case may be removed and the District Court may determine all issues therein, or, in it discretion, may remand all matters in which State law predominates.

28 U.S.C. 1441(c) (emphasis added).

In addition, to the extent that Paul's fraud claim is a reiteration of his Rule 60(b) motion in Paul IV, it is a "thinly veiled collateral attack" on a prior Federal Court ruling and thus is independently removable. *See* Rivet v. Regions Bank of La., F.S.B., 108 F.3d 576, 586 (5th Cir. 1997), petition for cert filed (U.S. June 11, 1997) (No. 96-1971).

Second, Paul argues that the removal is procedurally defective because Wood did not join in the removal petition. *See* Motion to Remand [Doc.# 22], at 2. It is true that under 28U.S.C. §1446(a), "the removal procedure requires that all defendants join in the removal petition." Doe v. Kerwood, 969 F.2d 165, 167 (5th Cir. 1992). However, the Fifth Circuit has also explained that the consent requirement does not mean that each defendant must actually sign the original removal petition. Instead, consent requires merely that "there must be some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have to do so, that it has actually consented to such action." Getty Oil Corp. v. Insurance Co. of N.Am., 841 F.2d 1254, 1262 n.11(5th Cir. 1988). On April 7, 1997, less than ten days after the other defendants filed their Notice of Removal, Wood filed Demand for Jury Trial with this Court [Doc. # 7]. Thus, Wood has consented to the removal by timely filing a written document that indicates his consent to the removal, and remand is not warranted on this ground. [14]

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14. In support of his argument that Wood did not join the removal petition, Paul disputes the authenticity of Wood's signature on a page allegedly included with the Copy of Defendants' Notice of Removal that was sent to Paul. Paul argues that Wood did not consent to removal because Wood's signature on this page was "FAXED from somewhere to somewhere...giving the false impression to plaintiff that Robert Wood has consented, signed and FAXED his consent to someone for submitting to the Court,

when, in fact, he did not." Motion to Remand [Doc.# 22], at 3. This argument is frivolous. It is undisputed that Wood did not join in the original removal petition. It appears that the page to which Paul is referring is Wood's answer, in which Wood asserts a general denial of Paul's factual allegations. See Defendant Robert M. Wood's Original Answer, Attachment to Motion to Remand [Doc. # 22]. As discussed above, Paul has not demonstrated that Wood did not consent to removal, nor has Paul demonstrated that someone other than Wood applied Wood's signature, without Wood's consent, to his Answer. In his Motion [Doc.# 22], Paul moves to strike this allegedly fraudulent exhibit. This Motion is DENIED.

Third, Paul argues that, because the United States was not served with the Notice of Removal pursuant to 31 U.S.C. §3730(c)(3), the removal is procedurally defective. See Motion to Remand [Doc. #22], at 4. This argument is meritless. As defendants point out, dispite the United States' inclusion in the heading of this case, the United States is not a party to this lawsuit. On April 15, 1997, the United States filed a Notice of Non-Intervention in State Court. See Defendants' Response [Doc. #26], at 2. In any event, Defendants indicate that the United States has been served with all pleadings filed since April 15, 1997, when the United States indicated how it wished to be served in this lawsuit. see id. Moreover, failure to comply with the qui tam service provision, 3730(c)(3), does not mandate any sort of sanction. *See* United States ex rel. Walle v. Martin Marietta Corp.,1996 WL 748456 (E.D. La.,Dec. 30, 1996) (rejecting argument that violation of 3730(c)(3) requires per se dismissal). Thus, even if Paul's argument is correct that Defendants violated 3730(c)(3) by not serving the United States with the Notice of Removal, that violation does not mandate, or even allow, remand of this action.

Thus, all of Paul's arguments in support of remand fail. The Court holds that Defendants properly reoved this action to Federal Court and accordingly denies Paul's Motions to Remand.

DEFENDANTS' MOTIONS TO DISMISS

In their Motions to Dismiss, Defendants argue that all of Plaintiff's claims are barred by res judicata. Paul has not submitted substantive responses to any of Defendants' legal arguments. Paul merely asserts that "defendants' argument on res judicata was improper and fraudulent & this Court should deny such fraudulent motion." See Response [Doc.# 17]. The Court agrees with Defendants that Paul's action is precluded in its entirety by res judicata. [15]

Under both Federal and Texas State law, res judicata bars a claim that has been previously adjudicated when four requirements are satisfied:(1) the parties in the later case are

identical to or in privity with, the parties of the prior case; (2) the prior judgment was rendered by a Court of competent jurisdiction; (3) the prior case concluded with a final judgment on the merits; and (4) the same claim or cause of action is involed in both cases. *see* Gulf Island-IV, Inc. v. Blue-Streak-Gulf IS OPS, 24 F.3d 743, 746 (5th Cir. 1994) applying Federal law), cert. denied, 115 S.Ct. 1112 (1995); Jones v. Sheehan, Young & Culp, P.C.,82 F.3d 1334, 1338(5th Cir. 1996) (applying Texas law). [16] Paul's claims in the current action are virtually indistinguishable from his prior claims and are therefor barred by res judicata.

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15. Defendants also argue that Paul's claims are barred by the applicable statute of limitations and that the fraud claim does not adhere to the heightened pleading requirement of Fed. R. Civ. P. 9(b). While these arguments appear to have merit, the Court does not address them because the Court is dismissing Paul's claims on the ground of res judicata.

16. It appears that the Defendants argue that both Paul III and Paul IV bar the claims presented in this case. Texas res judicata law applies to Paul III (a State case), See Jones, 82 F.3d at 1338, and Federal res judicata law applies to Paul IV (a Federal case), See Gulf Island IV, 24 F.3d at 746.

A. False Claims Act

In Paul IV, Judge Hittner already invoked res judicata to dismiss Paul's claims brought against PB-KBB, BMI, and PBQ&D under the False Claims Act. Judge Hittner explained:

In this case, the complaint arose from the same operative facts that gave rise to the prior lawsuit [Paul III]. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in these activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

Paul, at 860 F. Supp. at 374.

In the current action, Paul has repeated the very same claims that Judge Hittner and the Fifth Circuit have already held to be barred by res judicata. The only difference in his current False Claims Act claim is his allegation that Boulon participated in wrongdoing in addition to the previously named defendants. During the period at issue, Boulon was an employee of PB-KBB. The Court finds that, for the purposes of defending against Paul's claims, PB-KBB adequately represented Boulon's interests in the prior proceeding. See Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990) (a non-party is in privity with a party for res judicata purposes if the party adequately represented the non-partty's interests in the prior proceeding). Thus, the Court finds Boulon was in sufficient privity with PB-KBB that res judicata shields him, as well as the other defendants, from Paul's current False Claims Act claim.

B. RICO

In the current action, Paul alleges RICO violations as a new theory against PB-KBB, PBQ&D, BMI, and Boulon. However, the operative facts underlying this cause of action are the same as those in both Paul III and Paul IV, i.e. Defendants' alleged illegal behavior with respect to nuclear waste disposal shafts. This, Paul could have brought his RICO claim in either of the previous suits. His current attempt to sata this claim is barred by res judicata. See Nevada v. United States, 463 U.S. 110, 129-30 (1983) (when a Court of competent jurisdiction renders a decision on the merits of a case, that judgment is conclusive for the "'parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose"') (quoting Cromwell v County of Sac, 94 U.S. 351 (1877) (emphasis added).

C. Fraud

Paul's fraud claims in the current action raises the same issues that Paul argued in his Rule 60(b) motion, which Judge Hittner denied as frivolous in Paul [17]. The primary difference in the current action is that Paul has now added three individual defendants to the list of parties he alleges committed fraud on the State Court. These defendants are Boulon; Wood, (Paul's lawyer in Paul I, Paul II and Paul III); and Phipps (PB-KBB's lawyer in Paul III and Paul IV). As explained above, Paul's claims against Boulon is precluded because Boulon was inprivity with PB-KBB, a previous defendant. In addition, Paul could have raised claims in Paul IV that Wood and Phipps engaged in fraudulent behavior in Paul III. However, he did not, and res judicata precludes him from bringing those claims now

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17. For instance, in his fraud claim, Paul asserts, as he did in his Rule 60(b) motion, that the use of Mahmud Mirza as an expert witness in Paul III constituted a fraud on the State Court.

IV. COSTS

In Paul III, the Fifth Circuit warned Paul that "any additional frivolous appeals filed by him" would invite a stern reaction from the Court. See Attachment D to PB-KBB Motion to Dismiss, at 4. A frivolous appeal, the Fifth Circuit explained, would be one that raises arguments previously decided. See id.

For the past fourteen years Paul has beaten a continuously expansive trail of futile litigation to seek rederess for what he feels was a wrongful termination. With each case, the scope of alleged wrongdoing has widened, the list of alleged wrongdoers has lengthened and, with each case, Paul's claims have been rejected.

The Defendants in this lawsuit have endured fourteen years of litigation at considerable cost over matters that share a common nucleus of operative facts. As a result, Defendants have asked that this Court order Paul to pay the costs spent by the Defendants in defense of this action, including reasonable attorneys' fees. The Court grants Defendant's request for an injunction to prevent further litigation in matters encompassed by Plaintiff's prior litigation against the Defendants. Monetary sanctions (other than costs of Court as permitted by 28 U.S.C. §1920) are denied at this time. *See* decretal paragraph at page 16 for additional detail.

V. CONCLUSION

For the foregoing reasons, it is

ORDERED that Paul's **Motions to Remand**[Docs. # 14 and 22] are **DENIED.** It is further

ORDERED that Defendant Battelle Memorial Institute, Project Management Division's **Motion to Dismiss**, based on Res Judicata [Doc. # 8] and the **Motion to Dismiss** of Defendants, PB-KBB, Inc., Parsons, Brinkerhoff, Quade & Douglas, Inc., Arson D. Phipps, and Paul Boulon [Doc. # 10] are **GRANTED.** It is further

ORDERED that Paul's claims against Defendant Robert M. Wood are **DISMISSED.** It is further

ORDERED that Qui Tam Plaintiff Dilip K. Paul's **Motion for Summary Judgment & Estoppels** [Doc. # 16], Qui Tam Plaintiff Dilip K. Paul's **Motion for Summary Judgment & Estoppels**[Doc. # 19], and Plaintiff's **Motion for Summary Judgment** [Doc. # 20] are **DENIED.** It is further

ORDERED that Defendants'**Motion for Continuance** of Plaintiff's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(f) [Doc. #25] and **Motion for Continuance** of Plaintiff's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(f) [Doc. #27] are **DENIED AS MOOT.** It is further **ORDERED** that Qui Tam Plaintiff Dilip K. Paul's **First Supplemental Petition & Motion for Estoppels** [Doc. # 17] is **DENIED.** It is further

ORDERED that Plaintiff's **Motion to Strike** [Doc # 22] is **DENIED.** t is further

ORDERED that Plaintiff pay costs of Court incurred by Defefendants in defense of this action, as provided by 28 U.C.C.§1920. Defendants' request for attorneys' fees is denied. It is further

ORDERED that Plaintiff is enjoined from filing any further litigation against any defendant in this action relating to Defendants' alleged illegal behavior with respect to the nuclear waste disposal shafts, Plaintiff's employment with Pb-KBB, or any other factually related matter. Should Plaintiff seek to file any additional claims against these Defendants, he must designate on the civil cover sheet the case is "related" to the instant action and the case shall be assigned to the undersigned. If any further case is found to be related to the matters as to which Plaintiff has been enjoined from litigation, Plaintiff's filing will be deemed a contempt of this Order and sanctions will be imposed. Sanctions may include payment of Defendants' attorneys' fees and costs for the new action, as well as other remedies available under the law.

SIGNED at Houston, Texas, this 30th day of June, 1997

/s/ Nancy F. Atlas

Nancy F. Atlas
UNITED StateS DISTRICT JUDGE

APPENDIX A4
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTONDIVISION

UNITED STATES OF AMERICA,
ex rel. DILIP K.PAUL
Plaintiff

v. CA NO. H-97-1004

PB-KBB,INC., et al.,
Defendants

MEMORANDUM AND ORDER

After the Court issued it Order on June 30, 1997, denying Olaintiff's multiple motions for remand and for summary judgment and dismissing the case in its entirety, see Memorandum Opinion and Order [Doc # 33] ("Order"). Plaintiff filed his fourt Motion for Summary Judgment [Doc.# 36] as well as Reply brief entitled "Motion in Response to Defendants' Response of 6/13/97" [Doc.#35]. Because these Motions were filed after the case was dismissed, the Court need not and will not consider them. [1]

Plaintiff has filed a motion for reconsideration of the Court's Order dismissing his case. See "Motion Filed Under FRCP 59" [Doc. #38]. In his new Motion, Plaintiff argues that remand of this case is appropriate because Defendant Robert Wood did not consent to removal. Although Plaintiff raised this argument in his earlier motions,

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1 Plaintiff claims that he filed these briefs before receiving notice that the Court had dismissed his case. the Court nevertheless declines to address them because these briefs do not contain any argument that woould have affected the Court's ruling.

Plaintiff now submits evidence for the argument, purporting to show that Wood affirmatively opposed removal. This evidence consists two photocopied pages of a legal text ("O'Conner's Federal Rules") with underlining and an arrow pointing to a rule, which states that all defendants must consent to removal of an action to federal court, and an envelope addressed to Plaintiff, with no return address, that Plaintiff claims contained these pages, see Attachment to "Motion Fled Under FRCO 59." Plaintiff argues that Wood sent these pages to him with the consent rule highlighted in order to inform him that he did not actually consent to removal. The Court rejects Plaintiff's continuing attempt to avoid dismissal of his case. His arguments here fails on a number of grounds.

First and Foremost, although Plaintiff appears to contend that he is entitled to a reconsideration of his case on the basis of newly discovered evidence, Plaintiff states that he received the envelope on May 10, 1997, which was six weeks before the Court entered its Order dismissing this action. Thus, this evidence is not newly discovered. *See* Farm Credit Bank of Texas v. Guidry, 110 F.3d 1147, 1155 n.28 (5th Cir. 1997) (evidence that was within the party's knowledge at time of trial, even if party did not understand significance of the evidence, is not newly discovered evidence for purpose of obtaining new trial). plaintiff had ample opportunity to submit this purported evidence earlier before the Court ruled on the multiple pending motions. Plaintiff is not entitled to reconsideration on the basis of evidence that was within his control prior to the Court's ruling.

In any event, this purported evidence contains absolutely no indication that it was sent to Plaintiff from Defendant Wood. Neither the envelope nor the pages contain Wood's signature oe even his name. Plaintiff merely alleges (without any sworn affidavit) that he recognizes his former attorney's

handwriting on the envelope. The Court lacks admissible evidetiary foundation on which to credit this allegation. Even if this purported evidence was sent to Plaintiff by Wood, it in no way indicates that Wood in fact opposed removal of this action. Had Wood opposed removal, he could have easily stated so, either in writing to other parties or by submission of his opposition to the Court. The Court need not in speculation Plaintiff as to the reasons for why he might have received and unsigned copy of a legal text with various underlinings.

As the Court ruled in its Previous Order didmissing this case, Wood expressed his consent to removal by filing a jury demand innfederal court. See Order, at 9; Demand for Jury Trial [Doc. # 7]. Plaintiff claims that such a demand does not constitute consent to removal, but he cites no legal authority in support of this claim. The Court, however, notes that in Frias v. Bexar County Bd. of Trustee for Mental Health Retardation Services, 925 F.2d 866, 873 n.6 (5th. Cir. 1991), the Fifth Circuit acknowledged that filing of a hury demand is "inconsistent" with opposition to removal. [2] Thus, the Court abides by its earlier ruling that Wood effectively consented to removal.

Finally, as Defendant Battelle Memorial Institute notes in its Response [Doc. # 39], Plaintiff did not file his first Motion to Remand [Doc. # 14] until May 1, 1997, which was thirty-five days after the Notice of Removal [Doc. #1] was filed on March 27, 1997. The court must deny a motion to remand on the basis of any defect in the removal process if that motion was filed more than thirty days after the notice of removal. --

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2 The court explained that if the party who opposed removal, in that the plaintiff, wanted to file a jury demand in the event that the court denied remand, that party "easily could have filed his jury demand subject to the court's ruling on his motion for remand." Firas, 925 F.2d 873 n.6.

Likewise, in the case at bar, Wood did not in any way indicate that he was filing the jury demand despite his opposition to removal.

See 28 U..S.C. §1447 (c); Patin v. allied Signal, Inc., 77 F.3d 782, 786 (5th Cir. 1996). Thus, Plaintiff's Motion for Remand were also subject to denial for untimeliness. It is therefore

ORDERED that Plaintiff's Motiton for Rehearing ("Motion Filed Under FRCP 59") [Doc. # 38] is **DENIED**. It is further

ORDERED that Plaintiff's fourth Motion for Summary Judgment [Doc. # 36] is **DENIED.** It is further

ORDERED that Plaintiff's "Motion in Response to Defendants' Response of 6/13/97" [Doc. # 35] is **DENIED.** It is further

ORDERED that any further frivolous briefs or motions filed by Plaintiff in this litigation will be deemed a contempt of this Order and sanctions will be imposed, pursuant to the Court's previous Order.

Signed at Houston, Texas, this 7th Day of august, 1997.

signed- Nancy F. Atlas

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE